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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 840.

BYRAM CONCRETANKS, INC.,

Petitioner,

vs.

WARREN CONCRETE PRODUCTS CO. OF N. J., WARREN CONCRETE TANK CO., INC., VINCENT DOTOLO, RICHARD DUNKLE, PATRICK E. HIGGINS, LEONARD J. FARMER, JOSEPH W. ROGERS, HULSE MOONEY, EDISON READ, JOHN W. KLEIN, FRANK M. BERRY, EDWARD C. STIERLI, JOHN EVERLY, E. BLAIR JOHNSON and BOARD OF HEALTH OF ROXBURY TOWNSHIP,

Respondents.

BRIEF FOR RESPONDENTS, WARREN CONCRETE PRODUCTS CO. OF N. J., WARREN CONCRETE TANK CO., INC., VINCENT DOTOLO AND RICHARD DUNKLE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Counter-statement of Questions Presented.

1. Did the Court of Appeals err in affirming the District Court's dismissal of the Petitioner's case where there was no showing of a violation of the Anti-Trust Laws nor any evidence of damage to the Petitioner which was caused by the Respondents?
2. Did the Court of Appeals err in affirming the District Court's discretionary rulings on evidence and discovery matters?

Legend.

The individual respondents will be referred to herein by last name only.

Warren Concrete Products Co. of N. J., Inc. will be referred to herein as Warren Products.

Warren Concrete Tank Co., Inc. will be referred to herein as Warren Tank.

Dotolo, Dunkle, Warren Products and Warren Tank will be collectively referred to herein as Warren or Warren Respondents.

Warren Products and Warren Tank will be collectively referred to herein as Warren Companies.

The Board of Health of Roxbury Township will be referred to herein as the Local Board.

Higgins, Farmer, Rogers, Mooney, Read, Klein, Berry, Stierli, Everly, Johnson and the Local Board will be collectively referred to herein as Roxbury Respondents.

15 U. S. C. A. § 1 is referred to herein as Section 1.

15 U. S. C. A. § 2 is referred to herein as Section 2.

The ordinance of the Township of Roxbury adopted by the Board of Health of the Township of Roxbury on December 18, 1958, is referred to herein as The 1958 Ordinance.

Standards for the Construction of Sewerage Facilities for Realty Improvements, promulgated December 7, 1954, by the New Jersey State Department of Health under the provisions of Chapter 199, P. L. 1954 (see e.g., Appendix "D," Pp38-Pp40), are referred to herein as State Standards.

The abbreviations set out in the Legend in the Petition (Pp1) will also be followed herein.

Counter-statement of the Case.

1. Prior Proceedings.

This fanciful anti-trust litigation concerns the business of the manufacture and sale of concrete septic tanks as carried on in New Jersey by two local corporations. In particular, the action deals with the sale of septic tanks in one municipality, the Township of Roxbury, which is located in the northern New Jersey county of Morris.

The genesis of the matter was the frustration of the Petitioner's efforts at delivering 11 particular septic tanks into Roxbury Township for installation and use in sewage disposal systems there. See, e.g., Conclusion (Pb46). The Petitioner claims that installation of these tanks was arbitrarily and capriciously prohibited by Higgins, the Sanitary Inspector of Roxbury Township (R126a, R128a-R132a, R134a-R141a). These rejections resulted in a *cause celebre* that has continued unabated in the courts and agencies of the State of New Jersey and the Federal Government for nearly six years.

First, in May 1958, Petitioner brought suit in the Superior Court of New Jersey against Patrick E. Higgins. (Affidavit of John R. Miller, in Opposition to Plaintiff's Motion to Compel Answers to Interrogatories, filed July 25, 1960.) Subsequently, in that action, Petitioner added the Local Board, as a body, and each of its members, individually, as parties defendant (*Id.* at 4). The cause, denominated as an "action for injunctive and other relief for interference with the business of the plaintiff, etc.," was pretried in November, 1959 (*Id.* at Exhibit A, p. 1).

During the course of these proceedings, in April, 1959, the Petitioner filed charges with the New Jersey State Commissioner of Health against the Local Board and Higgins (R122b-R124b)..

Then, a month after the State case pretrial, came the institution of the instant anti-trust suit, containing all the same charges against the Roxbury Respondents as were set forth in the New Jersey Superior Court action, as well as new charges against those Respondents, and also bringing in as parties for the first time the Petitioner's competitors, the Warren Respondents, who were now alleged to have been responsible for the rejection of Petitioner's tanks in Roxbury Township because of their alleged bribery of and conspiracy with the Roxbury Respondents in violation of Section 1 of the Sherman Act. The Complaint also rung in against the Warren Respondents charges of monopoly in violation of Section 2 of the Sherman Act. Although all of the specific allegations of the Complaint had reference to events in Roxbury Township, there were also vague, general charges of wrongful conduct by Warren outside of Roxbury Township (R11a-R15a).

Shortly, thereafter, on April 1, 1960, the Petitioner, having failed to prosecute the New Jersey Superior Court action which was then nearly two years old, suffered a dismissal with prejudice of that case. Affidavit of John R. Miller, *supra* at 3.

Petitioner's next move was to try to bring the fire of the United States Government on the Respondents. In that connection, it made a complaint to the Federal Trade Commission on July 13, 1960 (R125b-R126b). There is no rec-

ord that either the Federal or State governments ever felt disposed to dignify the Petitioner's charges by taking any formal action against the Respondents. See, e.g., R127b.

After lengthy and disputed pretrial maneuverings, including an abortive attempt by the Petitioner to mandamus Judge Meaney, *Byram Concretanks, Inc.* v. *Meaney*, 286 F. 2d 170 (3rd Cir. 1961), this matter came on for trial on November 27, 1962.

The Petitioner called as its witnesses its President (Edmund), a representative of the New Jersey Department of Health, a representative of the New Jersey Department of Labor and Industry, a representative of the Federal Housing Authority, three professional engineers, a certified public accountant and a competitor. It also subpoenaed ten of the Respondents as its witnesses. None of the testimony gave any credence to Petitioner's anti-trust charges. At most, it showed a petty dispute between the parties which belonged for settlement elsewhere than in a Federal forum. Accordingly, after eight days of trial, the case was dismissed at the completion of the Petitioner's proofs as a "glaring example of vicious, harassing and vexatious litigation" (R103b). The Third Circuit Court of Appeals affirmed the dismissal per curiam. *Byram Concretanks, Inc.* v. *Warren Concrete Products Co. of N. J.*, 323 F. 2d 994 (3d Cir. 1963).

2. Facts.

The Petitioner's zeal in carrying on this expensive and fruitless crusade against the Respondents can, perhaps, only be understood by observing Petitioner's counsel's own interest in the case.

The Petitioner was organized in late 1954 by Edmund Frankel ("Edmund"), a former laborer and mason contractor (T. 361-T. 362), with the help of his father (R22b-R23b), Leopold Frankel, Esquire ("Leopold"), the Petitioner's attorney and counsel in this suit and the other proceedings arising out of the events upon which this litigation is based (T. 73-T. 74). The stockholders of the Petitioner are Edmund, Leopold, Esther Frankel, Esquire (Edmund's mother, who is also a lawyer and a partner in Frankel & Frankel, Esquires, with her husband, Leopold) and Harold Frankel, Edmund's brother (T. 363-T. 364). The four Frankels also hold the officerships in the Petitioner.

All of the Petitioner's office work is done by Leopold's secretary in his law office (R26b). Edmund, allegedly the sole owner of the Petitioner (Pb3), has nothing to do with the office work and does not even know if his father's secretary is remunerated by the Petitioner (R26b-R27b). He is equally non-conversant with the financial structure of the Petitioner (R22b-R24b).

The involvement of the Warren Respondents in the concrete septic tank business with which this case is concerned began in 1952 when Dotolo, a former building supplies salesman (T. 524), and Dunkle organized Warren Products to act as a distributor in New Jersey of precast, machine-spun, *round* concrete septic tanks, known as Keystone tanks (T. 614, T. 686), then being manufactured by Mr. Walter W. Swarr, of Lancaster, Pennsylvania (T. 525) who made these tanks on a machine leased from Warren Concrete Products Company of Pennsylvania ("Warren of Pennsylvania") (R287a). Like the Petitioner (Pp6), Warren started out on a very small scale (T. 524-T. 527).

In 1952, precast concrete septic tanks had only shortly then come into vogue. Prior, steel tanks and septic receptacles built in the ground out of cinder blocks were the commonplace (T. 783-T. 784) in areas where public sanitary sewerage facilities were not available. As late as 1953, Warren Products was the only supplier in its area which offered a precast concrete septic tank (T. 617).

Using various locations in northern New Jersey for its home base (T. 524, T. 526-T. 527), Warren Products acted as a distributor for Swarr's Keystone tanks until 1955 (T. 526).

The second corporation, Warren Tank, was formed by Dotolo and Dunkle in 1954 (T. 519). Eventually, Warren Tank became the sales organization for the enterprise and Warren Products became the manufacturing entity. Dunkle ran the manufacturing plant and the production end of the business; Dotolo was in charge of everything else (R196a-R197a, R56b).

Precast concrete septic tanks first became of interest in the Township of Roxbury, New Jersey in early 1953. Previously, only steel and built-in-place tanks were allowed in the Township (R105b).

In connection with his efforts to promote the sale of his Keystone tanks which sold at a cheaper price than the more commonly used steel tanks, Dotolo solicited as a prospective customer Mr. John Grabovetz, a builder in Roxbury Township, who theretofore had used metal tanks in his housing developments in that area. Grabovetz indicated

that he might be interested in purchasing Warren's Keystone tanks if Roxbury Township would change its regulations and approve precast concrete tanks for installation. Accordingly, Dotolo gave Grabovetz some literature, including specifications and drawings, concerning Keystone tanks (R58b-R59b).

Subsequently, on March 19, 1953, Grabovetz appeared at a meeting of the Board of Health of Roxbury Township to ask if Dotolo's concrete tanks could be used in the Township. He gave the Local Board information about the details of the tanks and, after due consideration, the Local Board, by appropriate resolution, ruled that these concrete tanks, or their equals, were approved and that Sanitary Inspector was authorized to issue permits for their use (R390a). Dotolo was not present at the meeting (R58b) and knew nothing about what went on there (T. 611-T. 615). Thereafter, for a short time Warren may well have enjoyed an absolute monopoly of precast concrete septic tank sales in Roxbury Township simply because no one else was offering that type of tank for sale in the Roxbury area (T. 617).

In early 1955, being then located at Saddle Brook, New Jersey (T. 527), Warren Products ceased being a distributor for Swarr (T. 525), got its own tank making machine on a lease from Warren of Pennsylvania (T. 686, R286a-R287a), and began manufacturing and distributing the same type of Keystone tank as had previously been supplied to it by Swarr (R139a-R191a, T. 614).

The Warren Companies' business has continued apace since 1955. In February-March 1959, Warren's manufacturing operations were moved to Waretown, New Jersey (R57b), and their administrative offices to Wayne, New

Jersey (T. 552-T. 553). No one disputes that the Warren Companies have been a successful business venture. However, the Petitioner's suggestions that Warren's accomplishments have come as a result of illegal actions rather than as the fruit of long, grueling and expensive years of entirely proper business activities, are absolutely baseless and unwarranted.

Further specific references to pertinent facts and testimony are made in the following Argument.

ARGUMENT.

The following Argument simply shows (1) that the instant Petition is presented to the Court on the basis of a recitation of facts which is unbelievably at variance with the proofs presented at trial and which has been unwarrantedly twisted by the Petitioner to suit its own purposes; (2) that this case is such an aberration from the normal anti-trust suit that it is irreconcilable with the law and prior decisions and, therefore, was properly dismissed by the trial court; and (3) that the District Court's discretionary rulings during pretrial and trial proceedings were proper.

POINT I.

The Petition is grounded upon a series of incredible inferences drawn by the Petitioner from a distorted version of the facts of the case.

The Petitioner's incredible Statement of the Case makes the conclusory, argumentative assertion that "Warren's sole aim was to demonstrate its 'superiority' by cornering the market, using the health inspection services as its vehicle, thereby preventing comparisons with the competition" (Pp7). Then, in particularizing this claim, Petitioner again improperly assumes the truth of its own conclusions in its allegedly factual references to "a monopoly in Roxbury," "special legislation in disguise," "non-complying tanks," "tell-tale evidence of lack of compliance" (Pp7), "false and fraudulent advertising," "massive campaign of vilification of petitioner's products," "business feudalization" (Pp8), "freight absorption," "corruption" (Pp9), "adulterated" products (Pp10), "preclusive ordinance", "wholesale exodus" (Pp12), etc. These scandalous epithets are the product of a series of fantastic inferences which the Petitioner has concocted from an unexcusably distorted remembrance of the actual facts of the case as they appeared from the evidence adduced at the trial.

While it is understandable that the conduct of the Petitioner's action, arising as it does out of alleged wrongdoing to the family business of Petitioner's counsel, would be highly charged with emotion and that this emotion would be intensified by the failure of the Petitioner's several pre-

vious attempts to seek redress of its alleged grievances in federal and state courts and administrative agencies (R122b-R127b), just as these circumstances do not excuse a counsel's continued use of ill-founded charges of fraud as a trial tactic when it is obvious that there is no basis in fact for such allegations, neither do they excuse the absolutely unwarranted assertions made in the Statement of the Case in the instant Petition when these assertions likewise have no foundation in the Record of the case. See *In re Woodmar Realty Company*, 294 F. 2d 785 (7th Cir. 1961), *cert. denied*, 369 U. S. 803 (1962); *Walters* v. *Chicago and North Western Railway Co.*, 216 F. 2d 332, 336 (7th Cir. 1954).

In order, therefore, to properly assess Petitioner's specious claims, it is first necessary to further correct in detail the facts as set forth in Petitioner's Statement of the Case and then to show that, based on such corrected facts, the inferences contended for by the Petitioner are absolutely unbelievable. In the interest of orderliness, the following argument is arranged generally in the same sequence of subject matter as appear in pages 7 through 12 of the Petition.

In connection with the motion adopted on March 19, 1953 ("the 1953 Motion") by the Local Board (Pp7), Dotolo testified that he knew nothing about the passage of the 1953 Motion prior to the Petitioner's litigation (R59b). He said only that as part of his customer solicitation he gave Mr. Grabovetz, a user of septic tanks, some advertising literature (R58b-R59b) which Grabovetz used for purposes of acquainting the Local Board with the details of the Keystone tank (T. 1131-T. 1132) when he suggested

and obtained approval for their use in Roxbury Township. Warren had absolutely no communication with Roxbury about the matter. Thus, there is no basis for the Petitioner's suggestion that Warren and Roxbury became "partners" in the adoption of "special legislation in disguise" to obtain a monopoly for Warren in Roxbury (Pp7).

Indeed, the 1953 Motion, coming at a time when only steel tanks and built-in-place tanks were allowed in Roxbury, was nothing more than a foresighted approval by the Local Board of a new type of septic tank which has now found approval and wide use throughout the entire State of New Jersey.

Similarly, there is no support in the Record for Petitioner's statement that Warren's tanks were found "more equal" than those of the Petitioner and others (Pp7).

Another assertion meant to mislead the court is that Warren installed 800 tanks in Roxbury (Pp7). Dotolo said 376 tanks (R67b) and there was no testimony to the contrary. These distortions in the Petitioner's Statement of the Case typify the tactics adopted by the Petitioner in its unceasing campaign to vilify and harass the Respondents.

As to Higgins' alleged "orders to accept only Warren's (round) tanks" (Pp7-Pp8), the citation to the transcript simply does not support the Petitioner's assertion. Moreover, Higgins" failure to keep records of his inspections supports no inference of wrongdoing on Warren's part. Indeed, Higgins said that he did inspect and reject Warren tanks on occasion (T. 996-T. 1006).

Regarding Warren's advertising brochures, the statement (Pp8) that they were in violation of criminal laws

is merely Petitioner's counsel's own conclusion. There is no citation by Petitioner to any judicial determination of criminality because one does not, of course, exist. In addition, Petitioner is on rather tenuous equitable ground in attempting to condemn Warren's brochures when Petitioner's own literature (Ex. P-13, R389a, T. 264) boasted "Byram Concretanks comply with Federal and State of New Jersey specifications." Since Petitioner's claims were undoubtedly grounded on the same type of conditional approval letters as Warren had received from the Federal agencies (R379a), who was more fraudulent in its advertising: Warren, who printed the entirety of the Government letters so that the public could see for itself the conditions attached to the Federal approvals, or Byram, who merely blandly claimed that it complied, without any hint that its compliance was a conditionally accepted one? Warren certainly admits that when the Government asked it to stop reproducing the Veterans Administration and Federal Housing Administration letters in its brochures, it complied with the request.

As to the inference (Pp8) that it was improper for the Warren brochure (Ex. P-11, R388a, R125a) to suggest that prospective septic tank users see their local health officer first, for tank size and other local requirements for septic tank systems, it is not clear to whom the Frankels would have such queries referred. Would it be the local dog-catcher?

The support cited for the stories of the "danse macabre," vilification of Petitioner's products, price wars, etc. (Pp8-Pp9), is the testimony of the incredible witness, Edmund, and no reasonable man would ask that it be digni-

fied by rebuttal. Suffice it to say that the testimony of Dotolo (R68b-R73b) and of the members of the Local Board (R74b-R75b, R77b, R80b, R87b-R89b, R90b-R91b, R102b) was to the contrary. As a matter of fact, even Edmund said that he "laughed" at the idea that Dotolo could make a distributor out of him (R173a, T. 415).

As to the veracity of the Petitioner's list of "lost customers," on cross examination Edmund admitted that he had never sold anything to 2 of the parties on his list and had never sold a septic tank to 8 others on the list (R44b-R55b). Moreover, Petitioner did not call as witnesses any of the "customers" so that they could testify as to whether in fact they did not buy from Petitioner because of the Roxbury situation or because the Petitioner's products were of poor quality. The omissions in the Petitioner's case are as glaring as the distortions.

As to "business feudalization" (Pp8), more warped comment comes from the Petitioner through its careful failure to refer to pertinent testimony. Dotolo explained the Sebolt agreement (Ex. P-10, R386a, R120a) in that during the period prior to 1955 when Warren was distributing Swarr's tanks in northern New Jersey, Sebolt was distributing Swarr's tanks in southern New Jersey. When Warren established its own production facilities in Saddle Brook, Sebolt, in the interest of business efficiency, merely used Warren instead of Swarr as its source of Keystone tanks (R284a, R286a-R287a). Sebolt had ceased making tanks long before Warren became a manufacturer (R292a-R293a), and Petitioner's remark that Warren succeeded in making distributors out of its manufacturing competitors (Pp8) is without foundation.

Similarly, Ackerman (R119a) did not capitulate to Warren (R293a, R67b-R68b), but it would be too much to expect that the Petitioner (Pb8) would stick to the proven facts of the case. In addition, there is nothing to support Petitioner's assertion that "Warren laid siege to Petitioner's market by ringing it with dealers" (Pp9). Warren's answer to interrogatory number 16(a) pertained to stockyards (R66b). Moreover, the interrogatories were answered in September 1960, long after the period involved in this suit.

As to freight absorption, the inference of condemnation (Pp9) is vitiated by the fact that the Petitioner engaged in the exact same practice in its marketing territory (R20b, R37b) and the Petitioner has cited no authority as to why freight absorption is permissible for it but not for its competitors when no restraint of trade results from either's actions.

Moreover, it should be kept in mind that Warren moved its plant to South Jersey in February-March 1959 (R57b). At that time, Petitioner, by its own omissions in failing to qualify its tanks under the 1958 Ordinance, was legally unable to sell tanks in Roxbury (R85b). Therefore, it had no potential sales in Roxbury which could be lost to Warren because of freight absorption or anything else. Since Edmund did not testify as to any lost sales outside of Roxbury, there were, thus, no sales losses of Petitioner subsequent to Warren's moving to South Jersey for which Warren could be held responsible.

Petitioner also attacks Warren's pricing system (Pp9) which is basically the same as that of the Petitioner.

Edmund testified that he had different categories of prices (R20b-R21b), that there were deviations from his regular prices, although he did not remember what they were (R37b), that he gave discounts for prompt payment and reduced prices to get business (R37b-R38b). Indeed, some of the Petitioner's citations (Pp9) (R145a, R146a) show simply that in certain instances the Petitioner's prices were exactly the same as Warren's (R21b-R22b). No cost justifications were given for Petitioner's prices. Again, there is no authority given as to why Petitioner's system was proper and Warren's improper.

The crowning absurdity comes in a scandalous charge wherein the Petitioner contends that Warren corrupted local officials (Pp9). True, Warren had a public relations program in which its salesmen acquainted public officials with its products. No law against this is cited by plaintiff.

The situation of the spinning machine royalties was explained by Dotolo and not challenged (R208a-R220a). Merely because Dotolo wouldn't speculate on the stand as to the exact amount of his expense monies gives absolutely no cause for an inference that these expenses were not all properly recorded in Warren's office. At least Dotolo knew that there were expense accounts; Edmund knew none of the financial details of his company (R22b-R24b). In addition, Petitioner misstates Warren's position as to cash sales (Pp9-Pp10). Dotolo admitted that although Warren's records did not distinguish between cash receipts and check receipts, Warren had had more than one cash sale (R63b).

Still, Petitioner's counsel has the bold audacity to suggest to this court that the Warren bribed the other Re-

spondents in this matter. And this in light of counsel's admission in open court that he had no direct evidence of bribery (R16b-R17b).

In talking about adulterated products (Pp10), the Petitioner has conveniently overlooked the testimony of its own witness from the New Jersey State Department of Health. Mr. Shaw stated that the State Department does not approve designs of septic tanks but only offers consulting services (R65b). Moreover, the Petitioner's own expert engineer, MacFayden, said that the interpretation of "precast reinforced concrete" is that reinforcement is needed at points where there will be stress (R92b). Since the State official testified that approvals of tanks come only from local Boards of Health (R65b) and since Warren's tanks were acceptable in all municipalities (R62b), it is obvious that the weight of authority differs from the Petitioner's conclusions regarding the compliance of Warren tanks with the State Standards. Moreover, there was no testimony that the claimed deviations of the Warren tanks from the State Standards had any deleterious effects upon the effectiveness of the Warren units as septic receptacles. As to the alleged short-sized tanks measured by Edmund, Dotolo admitted to the possibility of human error in his company's operations (R221a). The Petitioner apparently denies that it is subject to such fallibilities.

In addition, in its obtuse Appendix D (Pp38-Pp40), allegedly dealing with Warren tank violations, Petitioner has (1) conveniently omitted section 5.6 (f) which provides that septic tanks may be constructed of any material approved by the local board of health (Ex. P-16,

R401a, T. 268), (2) failed to note that section 5.11 in using the word "width" rather than "diameter," deals with rectangular tanks rather than round tanks and (3) similarly overlooked a twenty-four inch manhole in the top of Warren's tanks (Ex. P-3, R380a, T. 631).

The inference apparently suggested to be drawn from pages 7 through 12 of the Petition, is that Warren is responsible for the loss of Petitioner's "customers". However, it should be noted that Edmund did not cite any particular instances where Warren allegedly caused him to lose sales other than in Roxbury Township. Indeed, its own witness stated that Petitioner's tanks had been installed all over the area (R92b)—Petitioner's area being within 20 miles of its plant (R33b-R36b).

As to Petitioner's sales outside of Roxbury Township, the obvious reasons, among others, why, if it is in fact true, Petitioner has found less success than Warren are: (1) Petitioner has no effective sales program; its sales efforts are conducted solely by Edmund who also doubles as tank maker, repairman, truck-driver, etc. (R27b-R31b); whereas Warren has a regular sales force (R56b-R57b); (2) Edmund, ostensibly the chief executive officer of the Petitioner, has absolutely no knowledge of the office and financial affairs of his company (R23b-R24b, R26b-R27b); indeed, it is conceivable that one reason why the Petitioner's prices are allegedly higher than those of Warren is because of inefficiency and mismanagement in Leopold's office over which Edmund has no control; Warren, on the other hand, divided its responsibilities so that one principal handled production and the other handled sales and all other details (R56b); (3) Petitioner has a bad reputation in the trade

in that after delivering a broken tank it refuses to replace same and then commences suit for the sales price of the broken tank (R98b); wherens Warren replaces tanks on which complaints are received (R221a-R222a).

As to Petitioner's efforts in Roxbury, if there was any merit to its claims that its tanks were arbitrarily rejected (Pp11-Pp12), why did it not take the matter up with the Local Board (R39b-R42b), why did it not pursue its action in the state court rather than failing to prosecute that suit, why did it not submit sufficient data under the 1958 Ordinance to qualify its tanks (R85b)? Moreover, what kind of a concrete tank monopoly would have allowed one-half of Roxbury's septic tank installations to be of steel construction (R364a-R366a, R100b-R101b) would have allowed the competing tanks and products of the Petitioner (R38b-R39b, R43b-R44b) and three other concrete tank makers (R101b) to be installed, and would also have allowed Warren tanks and products to be rejected (R99b-R100b, R102b)?

In sum, Petitioner's business failures are well shown to be of its own making and not the work of anyone else.

Similarly, the inferences that franchise dealer contracts (such as that between Warren and Sebolt), non-franchised dealerships, product stockpiling in strategic market areas and public relations programs are not a commonplace in American industry, only demonstrate again the Petitioner's marketing naivete. If Edmund had spent more time tending to business and less time carrying out ill-advised counsel to settle petty disputes in an anti-trust action, he might well have been in a better competitive position today.

As an afterthought, Petitioner seems to suggest that there was some impropriety in Dotolo's and Dunkle's sale of all or a portion of their interests in the Warren Companies (Pp12). Is it seriously contended that this, too, is prohibited by law?

Thus, the Petitioner would have this court draw from the evidence in the trial court certain inferences to support its charges of a monopoly and conspiracy to restrain trade in the sale of septic tanks, since, without these inferences, the Petitioner has not made out a prima facie case for relief. However, even upon the most elementary analysis, the facts shown by the evidence do not at all approach supporting the inferences urged by the Petitioner. Indeed, taking the Petitioner's fallacious Statement of the Case as true, the evidence recited tends, at best, equally to sustain either of two inconsistent inferences. Under such circumstances, the inferences argued for by the Petitioner cannot be held to be established. *Schad* v. *Twentieth Century-Fox Film Corporation*, 136 F. 2d 991, 996 (3d Cir. 1943); *Dipson Theatres* v. *Buffalo Theatres*, 86 F. Supp. 716 (W. D. N. Y. 1949), *aff'd*, 190 F. 2d 951 (2d Cir. 1951), *cert. denied*, 342 U. S. 926 (1952).

POINT II.

No important question of federal law is involved here.

Very simply, this case turns on the District Court's determination that the Petitioner's evidence and the inferences fairly supported by its evidence did not show a prima facie case for relief. What was here involved was a

unique set of alleged factual circumstances which are unlikely to ever arise again. Thus, Petitioner's claims of a "question of great public importance" (Pp14) are wholly without merit and there is no warrant for review by this Court on certiorari.

Indeed, Petitioner's penchant to create issues out of whole cloth is further illustrated in the instant Petition by the feigned argument that the Third Circuit based its affirmance on a theory of collateral estoppel or res judicata (Pp19-Pp21). Of course, there was no reference to the prior State Suit in the District Court's letter opinion (Pp31-Pp33), and the Third Circuit's remarks about the earlier case (Pp35) were merely in the nature of a historical reference.

POINT III.

The decision below was clearly correct and was not in conflict with other decisions or with applicable law.

A. The Petitioner's case was properly dismissed by the Trial Court.

As to Petitioner's claim of a deprivation of jury trial (Pp17-Pp19), suffice it to say that the rule of this Court regarding review of trial evidence, e.g., *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U. S. 690, 696 (1962), is followed precisely by the Third Circuit. *O'Brien* v. *Westinghouse Electric Corporation*, 293 F. 2d 1 (3d Cir. 1961). Moreover, there is, of course, no dispensation for antitrust plaintiffs from the effects of Rule 41(b) of the Federal Rules of Civil Procedure. See, e.g., *Independent Iron Wks., Inc.* v. *United States Steel Corp.*, 177 F. Supp. 743 (N. D. Cal. 1959).

1. As a matter of law, the Petitioner did not make out a prima facie case of a violation of Sections 1 or 2.

In the instant situation, the Petitioner alleges a conspiracy between the Roxbury Respondents on the one hand and the Warren Respondents on the other hand. The Roxbury Respondents, consisting of a municipal board of health, its members and the township sanitary inspector, had, of course, no official power to act outside of Roxbury Township. Therefore, the effective area of this conspiracy is limited to Roxbury Township; the Warren Companies' operations outside of Roxbury Township have no relevance to the alleged violation of Section 1, since no contract, combination or conspiracy concerning Warren and any non-Roxbury co-conspirator has been specified by the Petitioner in its charges (R12a), and a corporation cannot conspire with itself to violate Section 1. *Cott Beverage Corporation v. Canada Dry Ginger Ale*, 146 F. Supp. 300 (S. D. N. Y. 1956), *appeal dismissed*, 243 F. 2d 795 (2nd Cir. 1957).

The Petitioner offered absolutely no proof of any contract, combination or conspiracy between the Roxbury Respondents and the Warren Respondents. Instead, it took the almost comical position of asking that such a combination or conspiracy be inferred from the mere fact that the Warren Companies sold their tanks freely in Roxbury Township whereas the Petitioner had some difficulty in selling its tanks there.

As evidence of the preposterousness of the Petitioner's position, none of the Section 1 and Section 2 cases cited by Petitioner in its brief (e.g., Pp16, para. 3) have the vaguest similarity or relevance to the facts of the instant suit. The principal and crucial distinction is that in the cases cited

by the Petitioner the alleged co-conspirators were persons who stood to profit business-wise as a result of the conspiracy.

Not so in the cause at bar.

The Roxbury Respondents are not in the septic tank business and the success or failure of the Petitioner is of no commercial interest to them. Thus, in an attempt to show a consideration passing to the Roxbury Defendants for their participation in Warren's alleged conspiratorial activities, Petitioner scandalously claims that Warren bribed the Roxbury Defendants.

But, the Petitioner's redress against bribery is under the criminal laws of New Jersey, rather than under the subject anti-trust acts.

However, not only has Petitioner never lodged criminal bribery charges against the Respondents, but more important, at the time of trial, nearly three years after the commencement of this action, the Petitioner admitted that it had no direct evidence of such bribery (R16b-R17b).

Moreover, the proofs did not show that any dealings the Warren Respondents had with the Roxbury Respondents were illegal or improper. Thus, there was no logical or reasonable inference of conspiracy that could be drawn from the evidence presented by Petitioner. *Independent Iron Wks., Inc. v. United States Steel Corp.*, 177 F. Supp. 743 (N. D. Cal. 1959).

The facts of the instant case are so far removed from constituting a cause of action under Section 1, that the Respondents clearly merited the summary relief granted

by the District Court at the conclusion of the presentation of the Petitioner's evidence.

Similarly, there was no marking out of a relevant market area or any proof that Warren by itself had any power to control prices or exclude competition as would make a prima facie case under Section 2. See *United States* v. *E. I. DuPont de Nemours & Co.*, 351 U. S. 377 (1956). Indeed, there was no evidence at all to show that Warren's progress in the septic tank industry was not fairly and honestly achieved.

2. The evidence did not show any injury to Petitioner which was proximately caused by the Respondents.

In an anti-trust action, the burden is on the Petitioner "to prove an injury to either his business or property of which the conduct of the defendant was the proximate cause". *Dollac Corporation* v. *Margon Corporation*, 164 F. Supp. 41, 65 (D. N. J. 1958), *aff'd* 275 F. 2d 202 (3d Cir. 1960). In the instant case, there was no evidence that any loss suffered by the Petitioner was caused by Warren.

Indeed, Edmund admitted that metal tanks were sold in his area (R60a). Interestingly, though, he gave no reasons why, if Warren was put out of the septic tank market, the void would not be filled by metal tanks rather than Petitioner's tanks. Moreover, the Petitioner's entire case failed to show why any competitive losses it might have suffered were not due to metal tanks rather than Warren products.

Thus, since there was no evidence that any loss suffered by Petitioner was caused by Warren, the trial court properly rejected Petitioner's attempt to prove a loss of hy-

pothetical profits (Pp27, para. a). *Talon, Inc.* v. *Union Slide Fastener, Inc.*, 266 F. 2d 731, 736-38 (9th Cir. 1959); *Wolfe* v. *National Lead Company*, 225 F. 2d 427 (9th Cir. 1955), *cert. denied*, 350 U. S. 915 (1955).

The law is that Petitioner is required to prove that " 'as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted' ". *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 297 F. 2d 906, 909 (2d Cir. 1962), *cert. denied*, 369 U. S. 865 (1962). " 'The jury may not render a verdict based on speculation or guesswork.' " *Id.* at 910.

As in *Schwabe*, the Petitioner sought to prove damages through an expert statistician (Pp27). However, also as in *Schwabe*, there was no basis established for the expert's assumptions. There was nothing to support the premise that but for the Respondents' unlawful acts the Petitioner would have gotten any specific additional share of the septic tank market beyond that which it actually enjoyed.

Thus, Ex. P-43 (R415a) was properly excluded by the trial court. *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp., supra*, at 912. An additional infirmity in Ex. P-43 is that it assumes that every new home owner in the area would have made inquiry of the Petitioner about a septic tank. Hardly a likely prospect.

Also, the cases cited by Petitioner concerning damages (Pp16, para. 4) are inapposite since they deal principally with situations where the wrong or liability under the antitrust acts was established and the remaining issue was simply the quantum of the plaintiff's monetary recovery. In the case at bar, of course, the question of damages is not

reached because the Petitioner in the first instance did not show any wrong cognizable under the anti-trust acts.

In sum, Petitioner has wholly failed to show:

(1) a violation of the anti-trust laws and

(2) damages to Petitioner proximately resulting from the acts and conduct of the Respondents which constitute the violations. *Shotkin* v. *General Electric Co.*, 171 F. 2d 236 (10th Cir. 1948).

> "* * * the use of conventional anti-trust language in drafting a complaint will not extend the reach of the Sherman Act to wrongs not germane to that act, even though such wrongs be actionable under state law. We are not concerned with labels. Otherwise, an adroit anti-trust lawyer might use his skill in the use of words to convert many unlawful acts into anti-trust violations. The anti-trust laws were never meant to be a panacea of all wrongs". *Parmelee Transportation Company* v. *Keeshin*, 292 F. 2d 794, 804 (1961), *cert. denied*, 368 U. S. 944 (1961).

On the facts, the trial court's decision was manifestly correct.

B. The Trial Court's rulings on discovery and evidence matters were made properly within its discretion.

1. Pretrial discovery.

As to Petitioner's claims of error in the trial court's rulings on pretrial discovery issues (Pp22-Pp25), of course, an appellate court does not review discretionary rulings of the trial court, unless the latter's discretion has been clearly and prejudicially abused. 5A C. J. S. *Appeal & Error*, sec. 1583 (1958).

In ruling on pretrial discovery issues, a heavy burden weighs on the District Court to strike a delicate balance between two competing interests:

(1) the current tendency toward broadening the ambit of the anti-trust laws. e.g., *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U. S. 690 (1962); *Klor's* v. *Broadway Hale Stores*, 359 U. S. 207 (1959); *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115 (1955), which restricts Federal courts, on summary pretrial motions for dismissal or judgment, from disposing of any complaint brought under the anti-trust laws, no matter how small and localized is the underlying dispute, so long as there is even the most minute possible connection of the matter with interstate commerce; and

(2) the court's obligation to prevent untrammeled pretrial fishing expeditions where on the available record the plaintiff's claim appears to be insubstantial. *Waldron* v. *British Petroleum Co., Ltd.*, 4 F. R. Serv. 2d 30b.23, Case 1 (S. D. N. Y. 1961).

Of course,

> "each case where an inspection of books of accounts is resisted on the ground that it will disclose confidential information to a competitor is sui generis." *Service Liquor Distributors, Inc.* v. *Calvert Distillers Corporation*. 16 F. R. D. 513, 514 (S. D. N. Y. 1955).

Although Petitioner's Appendix filed in the Third Circuit did not include the pertinent motion or any affidavit of good cause, see 4 Moore, Federal Practice, para. 34.07, at 2442-2443 (2d ed. 1962), even assuming that the same were properly filed, there was no error in the District Court's denial of the Petitioner's requested inspection of

documents, since the parties were competitors and the inspection of Warren's delivery tickets would have revealed the names of its customers, and its confidential data concerning its customers, to the Petitioner which would have irretrievably injured Warren's competitive position (R9b-R11b, R13b). Under such circumstances the Petitioner had no untrammeled right to discovery. *Hartley Pen Co.* v. *United States District Court, etc.*, 287 F. 2d 324 (9th Cir. 1961); *Service Liquor Distributors, Inc.* v. *Calvert Distillers Corp.*, 16 F. R. D. 513 (S. D. N. Y. 1955); *Service Liquor Distributors, Inc.* v. *Calvert Distillers Corp.*, 16 F. R. D. 344 (S. D. N. Y. 1954).

Moreover, according to Petitioner, its sole purpose in attempting to examine the delivery tickets was to look for "cash" sales (Pp22). In addition, although denied by the Warren Respondents, Petitioner's attorney claimed that it knew all of Warren's customers (Transcript on Motions, Monday, January 23, 1961, filed May 29, 1961, pp. 28-29). Therefore, all Petitioner had to do to get the information it sought was to interview these customers.

> "'Good cause is not shown where the moving party has the information sought or can obtain the documents or information without recourse to the discovery rules.'" *Korman* v. *Shull*, 184 F. Supp. 928, 934 (W. D. Mich. 1960), *appeal dismissed*, 310 F. 2d 373 (6th Cir. 1962).

As to Petitioner's suggestion that the court should have allowed "partial discovery by the method of sampling a representative month's delivery tickets" (Pp23), the Record does not indicate that Petitioner ever made such a proposal to the trial court.

Finally, the gross inadequacy of Petitioner's proofs during the plenary trial clearly evidences the wisdom and farsightedness of the Trial Court's limitations on the Petitioner's pretrial discovery efforts. For, had the Petitioner been allowed untrammeled freedom to run rampant with its discovery, the Warren Companies, merely on the foundation of a baseless and unwarranted complaint, might have had to reveal their customer lists, customer redit data and customers' usage requirements, the fruit of Warren's many years of hard labor, to a competitor who theretofore, to all observations, had not been willing to invest the effort to develop for itself the business asset of a valuable customer list. The District Court must be allowed some discretion to sense the aura of a suit and when it finds that charges of bribery, corruption and fraud are lightly tossed about by a Petitioner with a penchant for litigation, the Trial Court's exercise of a nice degree of pretrial discovery protection for the Respondents is laudable. The courts and their discovery rules are meant to be used to do justice; when a party is inclined to use them for other purposes, special vigilance by the trial judge is imperative. See 4 Moore, Federal Practice, para. 34.10 at 2460 n. 11 (2d ed. 1962).

2. Trial evidence.

Similarly, the District Court's discretionary rulings on evidence matters during the trial were exercised within normal limits and should not be disturbed. *Brigham Young University* v. *Lillywhite*, 118 F. 2d 836 (10th Cir. 1941), *cert. denied*, 314 U. S. 638 (1941). Indeed, Petitioner's proclivity to bring in irrelevant, opinionated and other-

wise wholly improper matters placed great burdens on the District Court in order to keep the trial within manageable bounds.

As illustrations of the correctness of the trial courts' rulings, testimony as to what Petitioner's customers might have told Edmund (Pp28, para. b.) was properly excluded, *Buckeye Powder Co.* v. *Dupont de Nemours Powder Co.*, 248 U. S. 55, 65 (1918); collateral matters (Pp42, item 1) were rightly kept out, *Park Neponsit Corporation* v. *Smith*, 258 F. 2d 452 (1st Cir. 1958); and conclusory statements were appropriately prohibited (Pp43, item 12), *Hillside Amusement Co.* v. *Warner Bros. Pictures, etc.*, 224 F. 2d 629 (2d Cir. 1955). In other instances (e.g., Pp28, para. c; Pp42, item 4), Petitioner made no offer of proof; in still others (e.g., Pp43, item 8; Pp43, item 11), nothing was presented to the trial court to act upon and, of course, there is nothing in the trial transcript concerning any rulings made by the court.

3. Subpoena duces tecum.

Regarding the subpoena duces tecum (Pp28-Pp29), such a subpoena is properly quashable if it is unreasonable and oppressive. Thus, as in the instant case, where a Petitioner fails to take advantage of pretrial discovery and inspection proceedings and leaves until the time of trial a demand to produce a vast number of documents which will take considerable time to compile, a subpoena will be quashed. *United States* v. *Watchmakers of Switzerland*, 27 F. D. R. 513 (S. D. N. Y. 1961), *United States* v. *E. I. DuPont de Nemours & Co.*, 14 F. R. D. 341 (N. D. Ill. 1953). Similarly, the list of documents may of itself indicate unreasonable-

ness or oppression. *In re Grand Jury Investigation (General Motors Corp.)*, 174 F. Supp. 393 (S. D. N. Y. 1959).

A Petitioner's counsel bringing lightly founded charges of bribery, corruption and fraud should well expect a trial court to be most diligent in its efforts to protect the Respondents from harassing discovery efforts. Therefore, such a Petitioner is inviting a blanket protective order when in a subpoena duces tecum which covers one or two proper items it also includes a multitude of improper items. A burden of great care to not improperly use the processes of the court is cast upon such a Petitioner and it cannot expect to submit a substantially offensive subpoena to the court and ask it to pick out the one or two allowable items from a great morass.

Moreover, the trial court necessarily has great discretion in determining whether the harmful effects to one party of a subpoena duces tecum outweigh its beneficial effects to another party. Cf., *Application of Consumers Union of United States, Inc.*, 27 F. R. D. 251 (S. D. N. Y. 1961); *Thomas* v. *Hanover Steamship Corporation*, 183 F. Supp. 537 (D. Md. 1960). The trial judge's ruling should not be disturbed unless it clearly appears arbitrary. *In re Manufacturers Trading Corp.*, 194 F. 2d 948 (6th Cir. 1952).

As to some of Petitioner's individual claims of error:

(1) The purpose of the request for delivery tickets (Pp28) was to see if the delivery tickets showed cash sales by the Warren Companies. If so, the Petitioner would ask the jury to infer that any such cash sale receipts were turned over by the Warren Respondents to the Roxbury Respondents as bribery payments (R75a-R81a). The trial

court quite properly found the Petitioner's position to be preposterous but nonetheless granted leave to the Petitioner to renew its application if the Petitioner produced any additional, affirmative proof of Warren's bribery of the Roxbury Respondents (R81a). Petitioner never did renew its application. Moreover, Dotolo later admitted that although Warren's records did not distinguish between cash receipts and check receipts Warren had had more than one cash sale (R63b). Thus, for whatever Petitioner might think that its suggested inference was worth, the foundation facts were laid by Dotolo's testimony, the production of the delivery tickets would, therefore, have been surplusage and the trial court's ruling should not be disturbed, especially in view of the competitive situation of the parties and Petitioner's counsel's stipulation that it had no right to learn who Warren's customers were (R64b). In addition, contrary to the Petitioner's statements at Pp6 and Pp23, Judge Meaney never ruled during the pretrial motions as to what books and records the Respondents would be required to produce at the trial.

(2) Dotolo was a named Respondent and was obviously testifying on his own behalf. The subpoena request for corporate documents (Pp28) bears every indication of being an integral part of the Petitioner's continuous efforts to conduct a fishing expedition in the Respondents' affairs.

(3) The court's ruling regarding Warren of Pennsylvania documents (Pp28) was harmless since Dotolo later testified that Warren paid royalties on a basis of less than the total number of tanks it produced (R208a-R210a, R212a-R220a). Therefore, the basis for the Petitioner's absurd inference (R214a) was laid without the necessity for the production of the requested documents.

Conclusion.

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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April 10, 1964.